Filed 6/12/07 In re K.M. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.M. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. MICHELLE J., Defendant and Appellant.	E041602 (Super.Ct.Nos. J184238 & J184239) OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge. Dismissed.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant Michelle J.

Ruth E. Stringer, County Counsel, and P. Joanne Fenton, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer Mack, under appointment by the Court of Appeal, for Child 1.

Michael D. Randall, under appointment by the Court of Appeal, for Child 2.

This is the second appeal in this case following the juvenile court's hearing pursuant to Welfare and Institutions Code section 366.26.[1] The first appeal, case No. E038817,[2] was brought by the San Bernardino County Department of Children's Services (the Department) and minors Child 1 and Child 2 (the girls), who claimed that the court erred in failing to issue a finding that the girls were adoptable when it found that their siblings were adoptable. They further contended that the court abused its discretion by finding that the section 366.26, subdivision (c)(1)(A), exception applied to deny the request for termination of the parental rights to them. In an unpublished decision, we agreed with the Department and the children and reversed the orders as to Child 1 and Child 2, which denied the request for termination of parental rights and selected guardianship as the permanent plan. Specifically, we concluded that the record supported the court's implied finding that the girls were adoptable, and we held that the court's decision to deny termination of parental rights based on the section 366.26, subdivision (c)(1)(A) exception was contrary to the law, not supported by the evidence, and amounted to an abuse of discretion. The matter was remanded to the juvenile court for further proceedings.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] On November 28, 2006, on our own motion we incorporated the record of case No. E038817 into the record of this case.

On remand, the juvenile court found that the girls were likely to be adopted and terminated parental rights. Michelle J. (Mother) now appeals from the order terminating her parental rights to the girls. She contends she was not given notice that the Department was recommending termination of parental rights or that the court was going to conduct a section 366.26 hearing. The Department disagrees substantively, and further moves for a dismissal of this appeal on the grounds the hearing held on remand was "not a section 366.26 hearing so the statutory notice was not required." It further argues that Mother was provided notice of the hearing, was ordered to attend, and the purpose of the hearing was to implement the order of this court.

I. PROCEDURAL BACKGROUND AND FACTS

The girls first came to the attention of the Department as a result of a voluntary maintenance case in January 2002. During the course of those services, Mother was imprisoned on drug possession charges. On September 16, 2002, the Department initiated dependency proceedings and the children were released to the care of their paternal grandmother (Grandmother). Over the course of the next few years, both parents were in and out of prison and continued to use drugs. At one point, Mother entered a residential treatment program that allowed the girls to be placed with her in November 2003; however, by March 2004, Mother moved out of the inpatient facility, enrolled in an outpatient program, and resumed using drugs. By July 2004, the girls were removed from Mother's care and returned to Grandmother's home where the Department recommended they remain.

A section 366.26 hearing was set. Both parents were present, and the Department recommended termination of parental rights and adoption of the girls by Grandmother. On August 16, 2005, the juvenile court chose not to terminate parental rights, choosing legal guardianship as the long-term plan. The Department and the girls appealed the court's decision. Meanwhile, the status review report dated March 6, 2006, recommended continued placement of the girls with Grandmother, with adoption still to be considered. Grandmother remained interested in adopting the girls because she had already adopted their brothers. Mother was not present at the review hearing on March 6.

On August 3, 2006, this court issued its opinion, wherein it reversed the juvenile court's finding that the section 366.26, subdivision (c)(1)(A) exception applied to deny the Department's request for termination of the parental rights as to the girls. We remanded the case to the juvenile court to implement our decision.

In the status review report dated September 5, 2006, the social worker again recommended that the girls remain in Grandmother's home and that adoption be considered. An April 7, 2006, visit with Mother had not gone well. The police were called when Mother became upset with Grandmother. Mother had told the girls they did not need to mind Grandmother because Mother was going to get them back. The girls asked the social worker if this was possible. They appeared relieved with the explanation that the court would ask the girls where they wanted to live. Both said they wanted to live with Grandmother. The report also noted problems at a visit on August 2, 2006, when Mother had choked and shaken Child 2 hard because Child 2 had kicked Child 1 and had not responded when called over by Mother. Child 1 said she wanted more

supervision at the visits. Child 2 said she was afraid of Mother and thought that Mother did not like her anymore. Child 2 felt jealous of Child 1's relationship with Mother. The social worker opined that the girls were afraid of Mother and afraid to be alone with her. The social worker recommended that visits be discontinued because they were detrimental to the girls and to their stability in Grandmother's home.

Mother attended the hearing on September 5, 2006. Visitation was suspended and the case was continued at Mother's request. She was ordered to return on September 12. Mother appeared on September 12 and the matter was continued on the court's own motion for further permanent plan review based on our decision in case No. E038817. Mother was ordered to return on September 26.

Mother did not attend the September 26, 2006, hearing. The court stated, "We are here on a remand from the Court of Appeal, and if I understand the Court's opinion correctly, we do not need a further hearing. The Court of Appeal felt that the record was clear, by clear and convincing evidence, that it was likely these children would be adopted, and the direction is to do everything again, but the mandate by the Court of Appeal is clear that this would be termination of parental rights and selection of adoption for a permanent plan for the children. Anyone disagree?" Mother's counsel replied, "I'll be objecting for the mother. She's not here."

The court continued, "I'm not sure I need to make findings because the Court of Appeal made those findings there's clear and convincing evidence that it is likely that these children will be adopted and there are no exceptions that apply. The Court of Appeal has made those findings based upon the record and to the extent that I'm

knowledgeable about them, I concur, not that Court of Appeal needs that. Therefore, adoption is the permanent plan. Parental rights are terminated."

II. MOTION TO DISMISS

On January 30, 2007, the Department filed a motion to dismiss this appeal on the grounds that under the doctrine of the law in the case, both the juvenile court and this court are bound by our previous decision finding (1) both girls are adoptable, and (2) there is no exception to the section 366.26 statutory directive that parental rights should be terminated. Mother disagrees. Instead, she argues that our words "remanded for further proceedings" mean that she "would have the opportunity to have another section 366.26 hearing in which to present other defenses or in which the [D]epartment would present evidence as to current condition of the children." We agree with the Department and conclude that this appeal must be dismissed.

In our opinion in case No. E038817, we specifically stated that "the juvenile court's decision to deny termination of parental rights based on the section 366.26, subdivision (c)(1)(A), exception was contrary to the law, not supported by the evidence, and amounted to an abuse of discretion. Accordingly, the orders as to [the girls], which denied the request for termination of parental rights and selected guardianship as the permanent plan, are reversed." Our words remanding the matter for "further proceedings" meant the juvenile court should enter a new order terminating Mother's parental rights and selecting adoption as the permanent plan. As our previous opinion noted, "there was substantial, clear and convincing evidence that [the girls] are adoptable" and that the benefit derived from maintaining a relationship with Mother

"does not outweigh the benefits of adoption so as to make the section 366.26, subdivision (c)(1)(A), exception applicable." Given this language, the Department correctly notes that the only action required by the juvenile court was the action it took, namely, to terminate Mother's parental rights and free the girls for adoption. Our findings regarding adoption, termination of parental rights, and the parental relationship benefit, when coupled with our words of remanding for "further proceedings," compels only one action. Mother's claim that "further proceedings" opens up the door for an entirely new section 366.26 hearing is misplaced. Had we meant for the juvenile court to conduct a new hearing, we would never have found that (1) the parental benefit exception does not outweigh the benefits of adoption, or that (2) the record supports a finding that the girls are adoptable.

"When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void. [Citations.] When, for example, 'a cause is remanded with directions to enter a particular judgment, it is the duty of the trial court to enter judgment in conformity with the order of the appellate court, and that order is decisive of the character of the judgment to which the appellant is entitled. The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, nor retry the case, and if it should do so, the judgment rendered thereon would be void.' [Citation.] [¶] A failure to follow appellate directions can be challenged by an immediate petition for writ of prohibition or writ of mandate. [Citations.]" (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982.)

Here, the juvenile court followed our directions in case No. E038817. The hearing held on September 26, 2006, was not a new section 366.26 hearing. It was a hearing to implement our decision, which reversed the juvenile court's orders as to the girls.

Notwithstanding the above, we find no merit to Mother's claim she was not given notice that the Department was recommending termination of parental rights or that the court was going to conduct a section 366.26 hearing. The hearing conducted on September 26, 2006, was not a continuation of the section 366.26 hearing of August 16, 2005. As the Department notes, that hearing resulted in a decision that was appealed in case No. E038817. Our decision established the fact that the girls were adoptable and that there were no exceptions to the termination of parental rights. No circumstances had changed and no party had filed a section 388 petition alleging a change in circumstances. Thus, there were no issues to retry, and the further proceeding was not a new section 366.26 hearing. (*People v. Mitchell* (2000) 81 Cal.App.4th 132, 150, overruled on other grounds in *People v. Barragan* (2004) 32 Cal.4th, 236, 259.)

"When a court is given specific words and actions, the decision which it makes is made as a matter of law. In this case the Supreme Court made a judgment that Browning had not been arbitrary; that he had not acted in bad faith. After a case fully tried, with facts not in dispute, the intent of the Supreme Court to us appears patent. It intended, as we read its opinion, that judgment in Browning's favor be entered. We can find nothing left for the trial court to retry. Except for formalities, the litigation had ended. [¶] . . . [¶]

"It has been stated: 'An unqualified reversal *ordinarily* has the effect of remanding the cause for a new trial on all of the issues *presented by the pleadings*.'

(Italics added.) [Citation.] We will not repeat here reference to cases which Mr. Witkin cites to support that well-settled rule. But the rule that an unqualified reversal without directions remands the case and sets it at large for further trial is a *general* one. . . .

"The fact that the rule we discuss is a 'general' rule implies that it has limitations. One limitation is that a case is to be set at large for retrial only when that is the intent of the appellate court. 'Judgment reversed' at the end of an opinion is, of course, strong indication of such intent. But when the opinion as a whole establishes a contrary intention, the rule is inoperative. To hold otherwise would be to make a fetish of form. Our Supreme Court did not give the last sentence such overriding importance in *Snapp v. State Farm Fire & Cas. Co*. (1964) 60 Cal.2d 816 . . . . There a trial court's judgment for a plaintiff had awarded him $8,168.25. On appeal the appellate court held he should have been awarded $25,000. The last sentence of the opinion, however, did not 'modify' the trial court's judgment to increase the award. It 'reversed' the judgment with directions that the amount be so increased. When the remittitur went down, the trial court allowed interest only from the date of the revised judgment. The court in *Snapp* held that was error. It stated the rule that allowance of interest from the latter date would have been proper had the order actually intended a *reversal* but that when a modification is intended the modified judgment bears interest from the date of the original judgment in the trial court. It was held that although the order portion of the opinion had read 'reversed' the court had obviously intended to say 'modified.' The court said the earlier opinion had shown that '[no] issues remained to be determined. No further evidence was necessary. Thus, the so-called "reversal" with directions, was, in fact and in law, a "modification."'

(P. 820.) The court concluded (on p. 821): 'It is not the form of the order on the first appeal that controls, but the substance of that order. . . . The important question as to when interest commences should not depend on mere formalism, but on the substance of the order.'" (*Stromer v. Browning* (1968) 268 Cal.App.2d 513, 518-519.)

Here, the juvenile court followed the substance of our previous opinion.

III. DISPOSITION

The appeal is dismissed.

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HOLLENHORST
Acting P. J.

We concur:

GAUT
J.

MILLER
J.